IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 21ST DECEMBER 2006 / 30TH AGRAHAYANA 1928

MFA.No. 345 of 2002()

IC.8/2000 of EMPLOYEES' INSURANCE COURT, ALAPPUZHA

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APPELLANT/APPLICANT:

M/S.BHARATH COFFEE HOUSE, BROADWAY, ERNAKULAM, COCHIN -31, REPRESENTED BY ITS SOLE PROPRIETOR, A.GOPALAKRISHNA RAO.

BY ADV. SRI. ANTONY DOMINIC

RESPONDENT/RESPONDENT:

THE REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION, ESIC BHAVAN, NORTH SWARAJ ROUND, TRICHUR.

BY ADV. SRI.P. SANKARANKUTTY NAIR

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 21/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.No. 1823 OF 2001 IN MFA.NO. 345 OF 2002

DISMISSED.

21.12.2006 SD/- K.T. SANKARAN, JUDGE.

/true copy/

P.A. TO JUDGE

K.T. SANKARAN, J.

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M.F.A. No. 345 OF 2002

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Dated this the 21st December, 2006

J U D G M E N T

The question involved in this case is whether the principal employer can contend that he is not liable to pay interest on the E.S.I. Contribution for the period during which he himself had obtained stay of collection of E.S.I. dues.

2. The appellant herein, M/s. Bharath Coffee House is the principal employer. There are more than 10 workmen employed in the establishment of the appellant. When notices were issued by the Employees State Insurance Corporation holding that hotels and restaurants are covered establishments coming within the purview of the Employees State Insurance Act and the Rules framed thereunder and calling upon the appellant to comply with the various provisions of the Act, the appellant filed O.P. No. 1863 of 1991 challenging the notices. Interim stay was granted in the Original Petition. O.P.No. 1863 of 1991 was disposed of along with connected cases as per the judgment dated 07.03.1995. The contention raised by the appellant herein that hotels and restaurants do

not fall within the purview of the definition of factory under section 2(12) of the Employees State Insurance Act was repelled in the light of the decision of the Supreme Court in **G.L. Hotels Limited vs. T.C. Sarin (1993 (4) S.C.C. 363).** However, while disposing of the O.P., a direction was issued that the petitioners in the O.P. may approach the Employees' Insurance Court under section 75 of the Employees State Insurance Act for appropriate reliefs against the notices impugned in the O.P. The E.S.I. Corporation was directed to keep in abeyance all proceedings pursuant to the notices, for a period of three months.

3. In the light of the judgment in O.P. 1863 of 1991, the appellant approached the Employees Insurance Court, Alappuzha in I.C.No. 72 of 1995, which was disposed of as per the judgment dated 15th January, 1998 holding that the appellant employed 12 workmen at the relevant time, i.e., in the month of September, 1990. Therefore recommendation for coverage with effect from 01.01.1990 was held to be proper. Based on the directions contained in the judgment in I.C.No. 72 of 1995, order dated 05.02.1999 was passed by the E.S.I. Corporation holding that the appellant is liable to pay a sum of Rs. 26,971/- for the

period from October 1990 to December 1998. The appellant paid those amounts later. Proceedings were initiated on 27.09.1999 under section 39(5) of the Act to realise interest on the contribution for the period from 01.09.1990 to 31.12.1998. Challenging that order, the appellant filed I.C.No.8 of 2000 on the file of the Employees Insurance Court. The appellant was also directed to pay penalty for the belated payment as per a separate order which was also challenged in I.C.No. 8 of 2000. The Insurance Court disposed of I.C.No. 8 of 2000 as per the judgment impugned in this M.F.A. The court below held that the appellant is not liable to pay penalty. However, it was held by the Insurance Court that the appellant herein is liable to pay interest on contribution amount.

4. Learned counsel for the appellant contended that in view of O.P. 1863 of 1991 and the interim stay granted therein, the appellant cannot be directed to pay interest on E.S.I. contribution. In view of the order of stay, the E.S.I. Corporation could not realise the amount from the appellant and the appellant was not liable to pay contribution amount. Therefore the appellant is not liable to pay interest. It was contended that a party cannot be penalised to pay interest on E.S.I. contribution when he was not liable

to pay contribution due to pendency of litigation and issue of order of stay. Counsel also relied on the decisions reported in **1998 (1) L.L.J. 841** (**H.M.T. Ltd. Watch Factory IV, Tumkur vs. Employees' State Insurance Corporation & Anr.**), **2001 (2) L.L.J. 930 (Employees' State Insurance Corporation vs. Karnataka Agro Industries Corporation Ltd.), 2001 (3) KLT 393 (Regional Director, E.S.I. Corporation v. Cannanore Spinning and Weaving Mills)** and **2006 (6) SCC 581 (Employees' State Insurance Corporation and others vs. Jardine Henderson Staff Association and others)** to substantiate his contentions.

5. Learned counsel for the E.S.I. Corporation, on the other hand, contended that the filing of O.P. No. 1863 of 1991 or the grant of interim stay therein are not grounds for the appellant in not paying the contribution within time and he cannot take advantage of the stay obtained by him in his favour to contend that he is not liable to pay interest. Counsel submits that the decisions in **2001 (3) K.L.T. 393** (**Regional Director, E.S.I. Corporation vs. Cannanore Spinning & Weaving Mills)**, and **2006(6) S.C.C. 581(Employees' State Insurance Corporation and others vs.**

Jardine Henderson Staff Association and others) are not applicable to the facts of the case as the cases involved in those decisions were filed by the employees challenging the coverage and contending that they are not liable to pay contribution. The factual position being different in the present case, it is contended that the appellant is not entitled to take advantage of his own wrong. He also submits that there is a statutory liability to pay interest on belated payment of contribution and that there can be no waiver of a statutory liability. He also relied on the decisions in **A.I.R. 1993 S.C. 1530**(**Employees State Insurance Corporation v. Hotel Kalpaka International)** and **2005(3) K.L.T. 609** (**E.S.I. Corporation v. Bagsvig**) and the judgment in M.F.A. 1024 of 2001.

6. Section 39 of the Employees State Insurance Act, 1948 provides for payment of contribution . Section 39(4) of the Act reads thus:

> *"The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations."*

The relevant Regulation mentioned in Section 39(4) is Regulation No.31. of E.S.I. (General) Regulation, 1950. Regulation No.31 reads thus:

> *"Regulation 31: Time for payment of contribution:- An employer who is liable to pay contributions in respect of any employee shall pay these contributions within 21 days of the last day of the calendar month in which the contributions fall due.*
>
> *Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure*
>
> *xx xx xx xx xx xx xx xx xx ".*

7. Section 39(5) of the Act provides that if any contribution payable under the Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of 12% per annum or at such higher rate as may be specified in the regulations till the date of its actual payment. Regulation 31-A provides that an employer who fails to pay contribution within the periods specified in Regulation 31, shall be liable to pay interest at the rate of twelve percent per annum in respect of each day of default or delay in payment of contribution.

8. Liability to pay interest under section 39(5) is peremptory. There is no discretion in the Corporation to waive payment of interest. Interest accrues on the lapse of last date of payment of contribution. As per Section 39(4), the last date for payment of contribution is the last day of the wage period. As per Regulation 31, a period of 21 days is provided for payment of contribution amount. By the expiry of 21 days, the liability to pay interest begins and no supervening circumstances would stop accruing of interest. In **E.S.I. Corporation vs. Bagsvig (2005 (3) KLT. 609),** it was held, with reference to Section 39(5)(a) thus:

> *"This is a statutory provision. The dates when contributions are due are also fixed in the statute. Merely because the E.I. Court has granted instalment facility to pay off the principle contributions, it cannot be stated that statutory interest is waived. Employees' Insurance Court has no authority to waive the statutory interest. The amount due has to be paid to the Corporation from the respective dates when they became due with proportionate interest till the payment is effected".*

In **The Cannanore Drug Lines vs. The Employees' State Insurance Corporation** (**M.F.A. No. 1024 of 2001 dated 12.12.2006),** a Division

Bench of Justice K.S. Radhakrishnan and Justice M.N. Krishnan, held thus:

> *"The bona fide impression of the appellant that his establishment was not covered under the provisions of the E.S.I. Act or the pendency of a dispute before the E.S.I. court regarding the appellant's liability to pay E.S.I. contribution cannot be a valid ground for exempting the appellant from paying interest in terms of Section 39(5)(a) and Regulation 31A. When the statute does not provide for any such exemption the respondent cannot exclude the amount of interest from the demand made against the appellant."*

9. The liability to pay interest is un-conditional. No notice is necessary to make a person liable to pay interest on delayed payment of contribution. As held by the Supreme Court in **A.I.R. 1993 S.C. 1530 (Employees' State Insurance Corporation v. Kalpaka International)**, a notice issued by the Corporation is only a reminder to the employer to discharge his statutory obligation. The liability to pay contribution was challenged by the petitioner by filing O.P.No. 1863 of 1991 and he got an order of stay in his favour. Because of the stay, the Corporation could not collect contribution nor could it take coercive steps to realize the same. A party who has got the benefit of obtaining a stay cannot take advantage of

the situation and contend that he is not liable to pay interest on the defaulted contribution amount. Though the order of stay was in his favour, it did not prevent him from paying the contribution. It only prevents the Corporation from realising the contribution. The inability of the Corporation to realise contribution, as realisation was stayed by an interim order of court, is not an answer for absolving the liability of the employer to pay interest. Therefore the contention of the appellant based on the decisions reported in **2001(3) KLT 393** (**Regional Director, E.S.I. Corporation vs. Cannanore Spinning & Weaving Mills**) and **2006 (6) S.C.C. 581 (Employees' State Insurance Corporation and others vs. Jardine Henderson Staff Association and others)** is of no avail, particularly when the cases involved in those decisions were initiated at the instance of the employees challenging the insurance coverage contending that they are not liable to pay contribution and that their employers are not entitled to deduct from their wages any contribution. The situation there was quite different from the situation here. Therefore, the principles laid down in those decisions cannot be made use of by the petitioner, who created a situation which is quite contrary to the situations which were available in

those cases, and contend that he is not liable to pay interest.

10. In **(1997) 5 SCC 772- Kanoria Chemicals and Industries Ltd. and others vs. U.P. State Electricity Board and others** , the Supreme Court considered the effect of an order of stay on the liability to pay "late payment surcharge " on account of delayed payment of additional electricity charges and held thus:

> "It is equally well settled that an order of stay granted pending disposal of a writ petition/ suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court. *Any other view would result in the act or order of the court prejudicing a party (Board in the case) for no fault of its and would also mean rewarding a writ petitioner in spite of his failure. We do not think that any such unjust consequence can be countenanced by the courts."*

In **Kanoria Chemicals' case,** the Supreme Court relied on the decision in **Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association ((1992) 3 SCC 1)** wherein it was held:

> *"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. "*

11. As regards **H.M.T Ltd, Watch Factory IV Thumkur vs. Employees' State Insurance Corporation & Anr.)** (**1998 (1) LLJ 841**), I am of the view that the said decision is distinguishable on facts. Paragraph 9 therein would indicate that the decision was rendered in the facts and circumstance of that case. The decision of the Karnataka High Court in **2001 (2) LLJ 930 (Employees' State Insurance Corporation vs. Karnataka Agro Industries Corporation Ltd.)** is also distinguishable. It was held therein that the principal employer is not required to pay interest, on the ground that the Corporation did not pass revised orders. In that case, the Corporation was found to be at fault and on that ground it was held that the employer was not liable to pay interest.

12. For the aforesaid reasons, I am of the view that the Insurance Court was fully justified in holding that the appellant is liable to pay interest on defaulted contribution amount. No interference in the judgment impugned is called for.

M.F.A. is accordingly dismissed. No order as to costs.

K.T. SANKARAN,
JUDGE.

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K.T. SANKARAN, J.

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M.F.A. No. 345 OF 2002

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Dated this the 21st December, 2006

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